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United States
Circuit Court of Appeals
For the Ninth Circuit. *2314*

ELSA METZ MASON,

Appellant,

vs.

THOMAS MITCHELL,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

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PAUL H. O'BRIEN,

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In the District Court of the United States, Southern
District of California, Central Division.

In Bankruptcy No. 39,517-B-H

In the Matter of

ELSA METZ MASON and THOMAS MIT-
CHELL, copartners,

Bankrupt.

PARTNERSHIP PETITION

To the Honorable Judges of the District Court of
the United States for the Southern District of
California, Central Division:

The petition of Elsa Metz Mason, of Los Angeles, in the County of Los Angeles, State of California, respectfully represents:

1. That on or about the 29th day of August, 1940, petitioner entered into a partnership agreement with Thomas Mitchell, for the purpose of the transaction of the business of recovering and selling shark liver oil. The said partnership has never been dissolved and petitioner and said Thomas Mitchell are still such copartners. That petitioner files this petition upon behalf of said partnership.

2. That said partnership and your petitioner and Thomas Mitchell have had their principal place of business and residence at 1007 Hilts St., West Los Angeles, County of Los Angeles, State of California, within the above judicial district, for a longer period of six months immediately preceding

the filing of this petition than in any other judicial district.

3. That said partnership owes debts and is insolvent.

4. Your petitioner is willing, upon behalf of said partnership, to surrender all the property of said partnership and all her individual property for the benefit of the creditors of said partnership, and of her creditors, except such property as is exempt by law, and petitioner desires upon behalf of said partnership to obtain the benefits of the Act of Congress relating to bankruptcy. [2]

5. The schedule hereto annexed, marked "Schedule A", and verified by the oath of your petitioner, contains a full and true statement of all the debts of said partnership, and, so far as it is possible to ascertain, the names and places of residence of its creditors, and such further statements concerning said debts as are required by the provisions of said Act.

6. The schedule hereto annexed, marked "Schedule B", and verified by the oath of your petitioner, contains an accurate inventory of all of the property, real and personal, of said partnership, and such further statements concerning such property as are required by the provisions of said Act.

7. The schedule hereto annexed, marked "Schedule C", and verified by the oath of your petitioner, contains a full and true statement of all her individual debts, and, so far as it is possible to ascertain, the names and places of residence of her cred-

itors, and such further statements concerning said debts as are required by the provisions of said Act.

8. The schedule hereto annexed, marked "Schedule D", and verified by the oath of your petitioner, contains an accurate inventory of all her individual property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore, your petitioner prays that a writ of subpoena be issued to said Thomas Mitchell, and that a hearing be had and said partnership be adjudged by the Court to be bankrupt within the purview of said Act.

ELSA METZ MASON

Petitioner

EARL E. MOSS

Attorney for Petitioner [3]

(Duly Verified.)

[Endorsed]: Filed Oct. 21, 1941. [4]

[Title of District Court and Cause.]

ANSWER OF THOMAS MITCHELL

Comes now Thomas Mitchell, named herein as an alleged partner of Elsa Metz Mason, and as an alleged member of the partnership of Elsa Metz Mason and Thomas Mitchell, and answering the so-called Partnership Petition, denies, admits and alleges as follows, to wit:

I.

This answering defendant, Thomas Mitchell, denies that on or about the 29th day of August, 1940, or at any time or at all, this answering defendant, Thomas Mitchell, entered into any partnership with Elsa Metz Mason, either generally, specifically or at all. This answering defendant, Thomas Mitchell, denies that he entered into any partnership, either for the transaction of a business of recovering and selling shark liver oil or any other purpose or at all. This defendant denies that he ever entered into any partnership in any manner or at all with Elsa Metz Mason. This defendant denies that this partnership, as alleged or at all, has ever existed, and therefore denies that it has never been dissolved, and denies that said partnership exists, has ever existed, or still exists. This defendant, Thomas Mitchell, alleges that he has never been a co-partner at all in any business at all with Elsa Metz Mason, either actual or ostensible. This answering defendant denies that Elsa Metz Mason filed the so-called Partnership Petition on behalf of any partnership, and denies that any partnership exists or ever did exist.

II.

This answering defendant, Thomas Mitchell, denies that he either alone or as a partner, which partnership he denies, ever had a or any place of business or any principal place of business at 1007 Hilts Drive, Beverly Hills or Los Angeles or any other place or at all, and denies that there was any part-

nership or that it had any place of business either in Los Angeles County, California, or at all. This answering defendant denies that this partnership had any place of business within this judicial district for any period or time or at all.

III.

This answering defendant, Thomas Mitchell, denies that this alleged partnership owes any debts and that this alleged partnership is insolvent. This answering defendant, Thomas Mitchell, alleges that he is solvent and has money and property in excess of the amount of the total combined debts of the alleged partnership of Elsa Metz Mason individually and of himself.

IV.

This answering defendant, Thomas Mitchell, denies that the schedules attached to the so-called Partnership Petition set forth any partnership debts or that they contain any true statements concerning the partnership or any partnership debts.

V.

This answering defendant, Thomas Mitchell, denies that [6] the Schedule B attached to the so-called Partnership Petition contains a list of any assets of any partnership of or to which he ever was a party, a partner, actual or ostensible, and denies that said schedule contains an accurate inventory of any property of any partnership, either as alleged or at all.

VI.

Answering Paragraph 7 of the said Partnership Petition, this answering defendant, Thomas Mitchell, has no knowledge other than hereinafter stated concerning the matters and things therein set forth, nor concerning the matters and things set forth in Paragraph 8, to wit: the matters and things relating to the Schedules C and D, purporting to be the schedules of Elsa Metz Mason individually, other than this. This answering defendant, Thomas Mitchell, is now informed and believes that Elsa Metz Mason was heretofore the owner of record of a ship known as "The Mariner." That with respect to the debts scheduled in Schedule A-3 of the so-called partnership schedules, there appears a list of creditors concerning which, this answering defendant is now informed, consist of persons and firms who supplied material to said vessel, "The Mariner", and concerning which the petitioner is now informed by his counsel that some of said creditors have heretofore filed libels and liens against said vessel, "The Mariner". This answering defendant never owned, had any interest in "The Mariner", directly or indirectly, and never had any dealings, directly or indirectly, with Elsa Metz Mason concerning said "Mariner". With respect to the claim asserted by Elsa Metz Mason that she is entitled to contributions in the estimated sum of \$8,000.00 from Thomas Mitchell by way of contributions to partnership disbursements, this answering defendant, Thomas Mitchell, alleges that he knows nothing concerning any partnership, actual or ostensible which has ever

existed between Elsa Metz Mason and Thomas Mitchell, and denies the existence of any such partnership [7] or any partnership at all and denies his liability to contribute to any partnership disbursements, and denies there were any partnership disbursements or partnership debts or partnership liabilities.

Further answering said Partnership Petition, as a separate and second defense thereto, said Thomas Mitchell alleges that heretofore one Fardell borrowed of and from Thomas Mitchell various sums of money, which said Fardell invested in a joint venture with Monty Glenwood Mason. That the relationship of said Fardell and Monty Glenwood Mason was defined by writings, under the terms of which Monty Glenwood Mason furnished to said joint venture the ship "The Mariner". That said joint venture, between said Fardell and Monty Glenwood Mason was one in which the name and personality of Elsa Metz Mason never appeared and was not known. That the relationship of Thomas Mitchell to said joint venture was one of a stranger, and that the relationship between Fardell and Thomas Mitchell was one of debtor and creditor only. That Thomas Mitchell has never entered into any relationship with Elsa Metz Mason with respect to any partnership, any joint venture, or otherwise, with respect to the business of recovering and selling shark liver oil, or with respect to the operation of the ship, "The Mariner", and Thomas Mitchell alleges that the filing of the Partnership Petition herein by Elsa Metz Mason is in bad faith and

without any foundation in fact or in law, and is an improper, illegal attempt to compel Thomas Mitchell, a stranger, to answer for the debts of Elsa Metz Mason. The said Thomas Mitchell being not liable for any of said debts, either legally or morally, and being an entire stranger to the affairs and business of both Elsa Metz Mason and that of her husband, Monty Glenwood Mason.

Wherefore, this answering defendant, Thomas Mitchell, prays that this proceeding be dismissed in as far as it concerns or relates to the establishment of any partnership as between this [8] answering defendant, Thomas Mitchell, and Elsa Metz Mason, or the recognition of any such partnership, directly or indirectly, and prays that this petition be dismissed absolutely as to this answering defendant, Thomas Mitchell; for the costs of this answering defendant, as may be herein incurred and taxed; and for all further relief, both in law and equity, as may be necessary for proper disposition and determination of the controversy sought to be liquidated herein by the filing of the said alleged Partnership Petition.

THOMAS MITCHELL

Thomas Mitchell, the Answer-
ing Defendant

RUPERT B. TURNBULL

KENNETH A. WHITE

Attorneys for Thomas Mitchell

(Duly Verified.)

[Endorsed]: Filed Oct. 31, 1941. [9]

[Title of District Court and Cause.]

ORDER DISMISSING PROCEEDINGS

Elsa Metz Mason filed herein the within proceedings under the provisions of Section 5 of the Bankruptcy Act. She alleges that she entered into a copartnership agreement with Thomas Mitchell; that the said partnership owes debts and is insolvent. The prayer of the said petition filed by her reciting, "Wherefore your petitioner prays that a writ of subpoena be issued to said Thomas Mitchell, and that a hearing be had and said partnership be adjudged by the Court to be a bankrupt within the purview of said Act."

Thomas Mitchell filed an Answer in which he denied the existence of the said partnership; denied that he was a copartner; denied that the alleged copartnership was insolvent and further alleged that he was solvent and had money and property in excess of the amount of the total combined debts of the alleged partnership. The prayer of his Answer sets forth "Wherefore, this answering defendant, Thomas Mitchell, prays that this proceeding be dismissed in as far as it concerns or relates to the establishment of any partnership as between this answering defendant, Thomas Mitchell, and Elsa Metz Mason, or the recognition of any such partnership, directly or indirectly, and prays that this petition be dismissed absolutely as to this answering defendant, Thomas Mitchell; for the costs of this answering defendant, as may be herein incurred and taxed;

and for all further relief, both in law and equity, as may be necessary for proper disposition and [11] determination of the controversy sought to be liquidated herein by the filing of the said alleged Partnership Petition." The following order of reference was made by Judge Ben Harrison, "On the Court's own motion, it is ordered that this matter be and it is hereby referred to Referee Hubert F. Laugharn for hearing on the issues herein and for all further proceedings."

The matter was thereupon set for trial before the undersigned Referee on April 2nd, 1942 at the hour of 10:00 A.M.

The said Elsa Metz Mason was represented by Earl E. Moss and Francis B. Cobb, and Thomas Mitchell was represented by Kenneth A. White and Rupert B. Turnbull.

Counsel for the respective parties stipulated that Thomas Mitchell, who is a well known and prominent motion picture actor, was solvent and had sufficient net assets and funds to pay in full all of the obligations of the said alleged partnership.

The issue was, therefore, directly presented as to the legal requirement of pleading and proof with respect to the Insolvency of the partnership, and, although the respective parties indicated that a trial of the issues presented by the said pleadings would take at least four days' Court time, the real issue which may be determinative of the entire case was then framed upon and about the simple propo-

sition, "when is a partnership (under Section 5 of the Bankruptcy Act) insolvent?"

Upon this sole point the matter was presented to the Referee for determination.

Extensive briefs have been filed herein by the respective parties.

The within proceeding was filed under the provisions of Section 5b of the Bankruptcy Act which provides, "A petition may be filed by one or more or all of the general partners in the separate behalf of a partnership or jointly in behalf of a partnership and of the general partner or partners filing the same: Provided, [12] however, That where a petition is filed in behalf of a partnership by less than all of the general partners, the petition shall allege that the partnership is insolvent * * *"

The Act of 1898, with respect to bankruptcies of partnerships, was ambiguous and led to considerable confusion. The Supreme Court promulgated General Order VIII which order provided that "Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the same partnership, * * * and he shall have the right to appear. * * * and to make proof, * * * that the partnership is not insolvent or has not committed an act of bankruptcy, etc."

However, the Supreme Court in 1925, in the case of *Meek v. Centre County Banking Company*, 6 Am. B. R. (NS) 1, 268 U. S. 426 abrogated this

general order (which incidentally it had promulgated), holding in effect that the said general order was substantive law and not within the contemplation of the authority delegated to the Supreme Court to make administrative and procedural general orders.

Section 5 was one of the Sections which was not only amended but extensively supplemented by the Chandler Act of 1938. Although we are concerned here only with the subdivision (b) which sets up the machinery permitting a general partner to file a petition upon behalf of the partnership, which petition as to any nonjoining or nonconsenting general partner was "involuntary" not as to an act of bankruptcy as contemplated by Section 3 of the Act but only as to the issue of the insolvency of the partnership. The requirement of the statute is that the "petition shall allege that the partnership is insolvent."

It is the interpretation of this phrase which concerns us here.

Cases will be referred to hereinafter which will define [13] when and under what circumstances a partnership is insolvent under the Act as it existed prior to the change effected by the Chandler Act.

Section 67a "Liens and Fraudulent Transfers" was recast by the Chandler Act, Section (d)(1)(d) thereof was added, providing "a person is 'insolvent' when the present fair salable value of his property is less than the amount required to pay his debts; and to determine whether a partnership is

insolvent, there shall be added to the partnership property the present fair salable value of the separate property of each general partner in excess of the amount required to pay his separate debts, and also the amount realizable on any unpaid subscription to the partnership of each limited partner; * * *"

The Chandler Act expanded the old Section on fraudulent conveyances and in fact set up the same to include the salient provisions of the Uniform Fraudulent Conveyance Act adopted by the principal commercial states. In California the Uniform Fraudulent Conveyance Act was adopted in 1939 and Section 3439.02 of the Civil Code provides: "(b) In determining whether a partnership is insolvent there shall be added to the partnership property the present fair salable value of the separate assets of each general partner in excess of the amount probably sufficient to meet the claims of his separate creditors, and also the amount of any unpaid subscription to the partnership of each limited partner, provided the present fair salable value of the assets of such *li* limited partner is probably sufficient to pay his debts, including such unpaid subscription."

It will be noted that the said Section 67d of the Bankruptcy Act provides "For the purposes of, and exclusively applicable to, this subdivision" etc. We will not then use this particular section to determine the present issue, but the question then presents itself: Do we have a different measure or defi-

nation [14] of when a copartnership is insolvent under Section 5 than under Section 67?

The Bankruptcy Act of 1898 made several changes over the prior Bankruptcy Acts of 1841 and 1867 with respect to bankruptcies of partnership. It provided that the partnership could be adjudicated a bankrupt distinct from its members. In other words it set up the partnership as a separate entity and thereupon there developed the so-called 'entity theory' with respect to partnerships.

There has never, however, been a true entity with respect to all phases of a partnership. An order of adjudication could be made against a partnership alone without regard to the individual bankruptcy of the individual members thereof. The discharge in such a proceeding did not discharge the obligation of the individual partners thereof. The partnership could not be put into involuntary bankruptcy under Section 3 by creditors (where insolvency was a requisite to the Act of Bankruptcy) unless the partners were likewise insolvent or, in other words, unless the net assets of the partners added to the assets of the partnership were less than the liabilities of the partnership.

In further contravention to the entity theory was the right and power to bring into the administration of a partnership bankruptcy the estates of the individual partners who were not in individual bankruptcy under the so called marshaling of assets theory whereby assets could be taken from the said partners to pay any deficiency after the assets of the

partnership had been shown to be insufficient to pay its liabilities. But there has never been a true entity theory as applied to partnership bankruptcy, and although the partnership may be adjudicated a bankrupt, its peculiar character is still retained because of the fact that the liability of the partners is either joint or several or both in accordance with the statutes of the respective States. The [15] obligation of the partners for the partnership obligation is not as guarantor or surety, but it is original and primary. For instance under those provisions with respect to the avoidance of liens or the setting aside of transfers or encumbrances (Section 67) it is not possible to put these provisions of the law into operation even though there is not one cent in the estate of the partnership with which to pay creditors if a single partner has sufficient net assets to pay the claims of the partnership creditors.

Why then should it be possible for one general partner to force the partnership into bankruptcy against the will or without the approval of a non-consenting general partner who maintains that he has sufficient net assets to pay all of the debts of the partnership, and who therefore maintains that the partnership is not insolvent?

The best possible answer to this question, and one which we must admit has considerable logic, is that when the partnership itself is insolvent several different courses of action may be taken by a general partner to apply the partnership assets to the partnership obligations, to-wit: (1) voluntary and mu-

tual agreement between the partners to liquidate the assets to pay bills, (2) agreed liquidation or mutual appointment of trustee to liquidate (3) state court action to dissolve, etc. Therefore why should not the general partner be permitted to force the liquidation in the bankruptcy court since it is recognized as the paramount court for the adjustment of creditors' rights? The nonconsenting partner could defeat the proceeding by paying off the said obligations of the partnership or could allow the adjudication knowing that his assets could be brought into the administration to pay the deficit of the partnership bills. For after all, he was already, and before any bankruptcy fastened with the same liability upon behalf of all of the partnership bills i.e. he was liable therefor.

[16]

Thus we see the logic of both sides of the question here so ably presented by respective counsel, Mr. Moss for Elsa Metz Mason and Mr. Turnbull for Thomas Mitchell, both of whom have spent many years in the service of this Court as Referees in Bankruptcy and who are not only the heads of their profession but learned students of bankruptcy law.

While the Chandler Act has extensively supplemented and rewritten that portion of the Bankruptcy Act dealing with partnership bankruptcies, I do not find any basic change effecting the question herein presented, i.e. "when is a partnership insolvent under the provisions of Section 5b?"

The legislators did not define the phrase "the partnership is insolvent", as here used, although the

definition under Section 67d was bodily and wholly placed in the Bankruptcy Act from the Uniform Fraudulent Conveyance Act. The answer must be that it was deemed to be a settled subject by case law interpretation existing at that time.

Let us then look into the subject from the standpoint of Court decisions thereon. The following cases of the respective circuit courts have held, either directly or by dicta in passing upon partnership bankruptcies, that the partnership while a separate entity subject to adjudication as such is not deemed insolvent unless the partners thereof are also insolvent or, in other words, if there is any solvent partner who has net assets, after paying his individual liabilities, sufficient to pay the partnership liabilities then the partnership is not insolvent.

First Circuit:

Houghton Wool Company v. Morris, et al 41
Am. B.R. 271, 249 Fed. 434

Gallagher, et al v. Hannigan, etc. 6 Am. B.R.
(NS) 224, 5 Fed. (2d) 171

Baker, et al v. Bates-Street Shirt Co., et al
6 Am. B.R. (NS) 547, 6 Fed. (2d) 854 [17]

Second Circuit:

In Re Samuels & Lesser, et al 32 Am. B.R. 436,
215 Fed. 845

Third Circuit:

In Re Meek v. Beezer, et al 12 Am. B.R. (NS)
433, 28 Fed. (2d) 343

Fifth Circuit:

Washington Cotton Co. v. Morgan & Williams
27 Am. B.R. 638, 172 Fed. 310

Sixth Circuit:

Vaccaro v. Security Bank of Memphis 4 Am.
B.R. 474, 103 Fed. 463

Titus v. Maxwell 49 Am. B.R. 156, 281 Fed. 317

Ninth Circuit:

Yungbluth v. Slipper, et al 26 Am. B.R. 265

There are, of course, many District Court cases following this theory, but no attempt will be made to cite the same here.

Our own District Court, in the Matter of Hansley & Adams, 36 Am. B. R. 1, was presented with the following situation, to-wit:

“Hansley and Adams were partners. Adams, one of the partners, filed a petition to have the partnership and himself declared bankrupts, alleging that Hansley was insolvent. The prayer of the petition was that the partnership and the members thereof, be declared bankrupts. Hansley opposed the proceedings.” Upon the findings of a special master, an order was made in the matter that the partnership be adjudicated a bankrupt.

“Hansley thereupon moved the court to vacate the adjudication, making the contention that the partnership could not be adjudicated without, at the same time, adjudging the indi-

vidual members of the partnership, bankrupts”
[18]

Judge Trippet held that the partnership could be declared a separate bankrupt, that it was an entity to that extent and that the statute did not impose the condition that the partners be declared bankrupts at the same time. Stating and quoting from the opinion:

“It is well settled that one partner may petition to have the partnership declared a voluntary bankrupt. It is undoubtedly necessary, except in certain cases, that the Court should determine that the members of the partnership are insolvent, otherwise the partnership would not be bankrupt. * * * The opinion *In re Bertenshaw* to the effect that the trustee elected by the partnership creditors cannot administer the estates of the members, has been disapproved by the Supreme Court, and Section 5 clearly contemplates this procedure. General Order No. VIII, provides for this course.

“Before arriving at the foregoing conclusions, I examined the following authorities: *Francis v. McNeal*, 228 U. S. 695, 30 Am. B. R. 244, 33 Sup. Ct. 701, 57 L. Ed. 1029; *Still’s Sons v. American National Bank* (C.C.A., 4th Cir.), 31 Am. B.R. 320, 209 Fed. 749; *In re Samuels* (C.C.A., 2d Cir.), 32 Am. B. R. 436, 215 Fed. 845, 132 C. C. A. 187; *In re Forbes* (D.C.Mass.) 11 Am. B. R. 787, 128 Fed. 137; *Vaccaro v. Security Bank of Memphis* (C. C.

A., 6th Cir.), 4 Am. B. R. 474, 103 Fed. 436, 43 C. C. A. 279; *In re Bertenshaw* (C. C. A., 8th Cir.), 19 Am. B.R. 577, 157 Fed. 363, 85 C. C. A. 61; *In re Meyer* (C.C.A., 2d Cir.), 3 Am. B.R. 559, 98 Fed. 979, 39 C. C. A. 368, and many others." [19]

Of course in 1925 General Order VIII was abrogated and there was no way for a partnership to be placed in voluntary bankruptcy by the copartners without the consent of the members, and, if any general partner objected, there could be no adjudication, until the passage of the Chandler Act in 1938, but the expression of Judge Trippet that "unless the Court should determine that the members of the partnership are insolvent the partnership would not be bankrupt" still remains the law.

Francis v. McNeal, 228 U. S. 695, 30 Am. B.R. 244, determined by the Supreme Court in 1913, holds in effect that where a partner is adjudicated a bankrupt the separate estates of the partners can be administered by the copartnership trustee. The opinion of Justice Holmes states in part:

"But the fact remains as true as ever that partnership debts are debts of the member of the firm, and that the individual liabilities of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention

of the Bankruptcy Act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end. A judgment could be got and the partnership debt satisfied on execution out of the individual estates. * * * So far as *Vaccaro v. Security Bank* is inconsistent with the opinion of the majority in *Re Bertenshaw*, we regard it as sustained by the stronger reasons and as correct."

[20]

The text writers and other cases referred to the portion of the opinion above recited as dicta. It is true that the particular point, (the necessity of insolvency to secure an adjudication of partnership) was not in issue because the order appealed from was an order marshaling the assets in a case of a copartnership already adjudicated, but if it is merely dicta, certainly we could have no clearer or concise answer to the question, "When is a copartnership insolvent?"

The principal case supporting the strict entity doctrine is *In Re Bertenshaw* (C. C. A. 8th Circuit) 19 Am. B. R. 577, 157 Fed. 363. This case was in turn followed by the case of *Matter of Everybody's Grocery & Meat Market*, 21 Am. B. R. 925, determined by the District Court of Oklahoma the following year. Since the said district is in the Eighth Circuit, it obviously was closely following the ruling of its superior court.

The District Court for the Eastern District of New York, in 1908, determined, in the case of Solomon & Carvel, 20 Am. B. R. 488, 163 Fed. 140, that the Bertenshaw case should be followed, but the same district court later in the matter of Max Kobre and Ginsberg, 35 Am. B. R. 389, abandoned the Bertenshaw case with the statement that the case had been disposed of by the cases of Francis v. McNeal, Vaccaro v. Security Bank of Memphis and In Re Samuels & Lesser, which latter case is in 32 Am. B. R. 436, 215 Fed. 845, and is of the 2nd Circuit, of which the said Court was a member.

While there has been a conflict between the views of the various courts on the question here presented, the law is deemed settled and fixed by the various writers of text books and service books on the subject of bankruptcy. To show their view on the particular point here in controversy, there is quoted hereinafter portions of their views on the subject, to-wit: [21]

Remington on Bankruptcy, Volume 4,
Page 693, Section 1746

“A partnership is not *be* be deemed insolvent unless the aggregate of all its own property, together with all of the individual property of its members in excess of their respective individual indebtedness, is less than its liabilities.”

Collier on Bankruptcy, 14th Edition,
Volume 1—Page 698

“It is to be remembered that notwithstanding the entity doctrine, each partner is indi-

vidually liable for the debts of the firm. It seems logical, therefore, in determining insolvency of a partnership, that not only must the firm assets be insufficient to pay its debts, but also that the assets of the individual members, after payment of their individual debts, be insufficient to make up the deficiency on the firm debts. * * * The Supreme Court by dictum approved this view (Cite *Francis v. McNeal*), although it has never passed upon the point expressly, it represents the weight of authority, (Cite *In re Bertenshaw*, *Matter of Solomon & Carvel*, and *Matter of Everybody's Grocery & Meat Market*, hereinabove referred to).

“It is noted that Section 5b of the Act of 1938, permitting a petition on behalf of the firm by less than all of the general partners, requires an allegation in the petition that the ‘partnership is insolvent’. It is arguable [22] that the purpose of Section 5b is to afford relief to a solvent member of a failing firm, and that it should therefore be sufficient to show that the firm assets are exceeded by the firm liabilities. However, the section does not define the meaning of the requirement that the ‘partnership is insolvent’. In view of the majority rule that a firm is not insolvent when any member is solvent, it seems probable that a member petitioning under Section 5b must show that the firm and all the partners are insolvent.”

Bradenberg on Bankruptcy, Section 41

“But the better rule, supported by a recent decision of the Supreme Court, is that the insolvency of the members of the firm as individuals is essential to the insolvency of the partnership, and that all the property which may be made liable for the firm debts must be considered in determining whether or not the copartnership is solvent. Partners are liable in solido, and in order that a firm may be adjudged a bankrupt, it must be shown not only that the copartnership is insolvent, but that every one of its members is individually insolvent.”

Browne on Bankruptcy, Chapter II, Section 7

“The better view and the true rule appears to be that in partnership bankruptcy, jurisdiction is conditional, i. e., subject [23] to the condition that both the partnership, as such, and all the individual partners, are insolvent.”

Section 5 as rewritten in the Chandler Act is referred to as the Weinstein draft, since Jacob I. Weinstein, prominent bankruptcy lawyer of Philadelphia, was instrumental in presenting this phase of the legislation to Congress. He is considered the “Dean of Bankruptcy Practitioners” in the United States, and his personal opinion on the point involved is set forth in the following words: “I was then familiar with the conflict in the decisions. However, I considered that the weight of authority reflected the dictum of *Francis v. McNeal*, 228 U.S.

695, 30 Am. B.R. 244, which clearly indicates that a partnership is not insolvent if, including the liability for partnership debts, any partner is solvent. While the reasoning of the Bertenshaw case is, perhaps, legalistically logical, the result is not realistic and I believe that the trend has clearly been the other way. Furthermore, it also seems to me that the marshaling of assets, required and contemplated by the provision of Section 5, which draws into the bankruptcy proceeding the administration of the individual estates of non-adjudicated partners, makes necessary and gives support to the prevailing rule.’’

The parties herein, having stipulated that Thomas Mitchell, the Alleged Partner, was solvent and had sufficient net funds to pay in full all of the obligations of the said alleged partnership, I must therefore determine that the petition filed herein by Elsa Metz Mason, under the provisions of Section 5 of the Bankruptcy Act to cause an order of adjudication of the said alleged partnership, should be dismissed.

It is, therefore, not necessary to determine whether or not the said Thomas Mitchell was a partner of the said alleged partnership or whether in fact any said partnership ever existed. [24]

Elsa Metz Mason has sought to use the forum of the bankruptcy court to determine the said question here presented. She heretofore filed with the Court her proceeding under Chapter XI of the Bankruptcy Act in which proceeding she sought to affect

a plan of arrangement with her creditors. This was her individual proceeding, and her proposed plan was predicated upon the realization on the possible equity in a sailing Yacht known as the "Mariner". The boat was sold in the proceedings with no net funds received for her creditors after payment of encumbrances and liens thereon. Thereafter this Referee dismissed the said proceeding when it appeared that nothing could be realized therefrom for the creditors.

In her said Chapter XI proceeding she indicated that Thomas Mitchell was interested in her business venture, to-wit: the operation of the "Mariner" in tropical waters in a shark fishing venture. It was never contended that the alleged partnership had any assets other than the said "Mariner".

This proceeding, thereupon brought by the said Elsa Metz Mason, brings no assets into court for the creditors either of the alleged partnership or of her own, in fact her position, after her former Chapter XI Arrangement Proceeding, was that neither she nor the alleged partnership has any assets. In effect this proceeding is for the benefit of her creditors who she now claims are partnership creditors, and the only way the proceeding could be of benefit to the said creditors, whether they are her individual creditors or partnership creditors would be to have this court declare that Thomas Mitchell was a partner and that the partnership should be adjudicated a bankrupt even though the said Thomas Mitchell admittedly had sufficient assets to pay in full the partnership creditors.

It clearly appears that this procedure should not be permitted. Under Section 67 the Bankruptcy Court would not per- [25] mit the filing of an action by the Trustee of a partnership bankrupt estate to recover property or set aside liens or transfers if a general partner had sufficient assets to pay the obligations of the partnership. We should arrive at the same general result here, therefore, the within proceedings are ordered dismissed.

Dated this 8 day of May, 1942.

HUBERT F. LAUGHARN,
Referee.

[Endorsed]: Filed May 8, 1942. Hubert F. Laugharn, Referee; M. E. Marsh, Clerk.

[Endorsed]: Filed May 25, 1942. [26]

[Title of District Court and Cause.]

PETITION FOR REVIEW

Comes now Elsa Metz Mason, the petitioner in the above matter, and petitions for a review of the order of the above entitled court dated May 8, 1942, a copy of which order is hereto attached, marked "Exhibit A", and made a part hereof, on the following grounds, which are the errors contained in said order:

1. That said order is against law.
2. That the findings of fact contained in said

order do not justify the drawing of the legal conclusions *said* forth in *set* order.

3. That the allegations contained in the petition in bankruptcy filed on behalf of the above described partnership are sufficient, and that it is not necessary, under the Bankruptcy Act, to include assets of the individual partners with those of the partnership in the allegations of the petition in bankruptcy or the proof in support thereof.

Wherefore, petitioner prays that said order be reviewed by the Judge and that the same be reversed.

Dated: May 18, 1942.

EARL E. MOSS and

FRANCIS B. COBB,

Attorneys for Petitioner,

By EARL E. MOSS.

[Endorsed]: Filed May 21, 1942. Hubert F. Laugharn, Referee; M. E. Marsh, Clerk.

[Endorsed]: Filed May 25, 1942. [27]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Hon. Ben Harrison, Judge of the District Court of the United States, Southern District of California, Central Division:

I, Hubert F. Laugharn, Referee in Bankruptcy, to whom the above entitled matter has been referred, do hereby certify as follows:

A Partnership Petition for voluntary bankruptcy was filed by Elsa Metz Mason, Petitioner, in the above entitled matter, on the 21st day of October, 1941.

Thereafter, on the 31st day of October, 1941, an Answer was filed by Thomas Mitchell, the said answer praying for a dismissal of the petition. The said answer denied the existence of the alleged copartnership and likewise denied the partnership was insolvent, and further alleged that the said Thomas Mitchell was solvent and had money and property in excess of the amount of the total combined debts of the said alleged partnership of Elsa Metz Mason individually and of himself.

Thereafter, on the 9th day of February, 1942, the Judge on his own motion ordered that this matter be referred to the undersigned Referee "for hearing on the issues herein and for all further proceedings".

A hearing on said matter was had before the undersigned Referee on April 2, 1942 at 10:00 A. M., and the matter was taken under submission by the

Referee, the parties thereafter filing [28] extensive briefs in support of their respective positions.

On May 8, 1942, the Referee made his order dismissing the proceedings, and on May 21, 1942, a Petition for Review of said Order Dismissing Proceedings was filed on behalf of the petitioner Elsa Metz Mason.

The Order Dismissing the Proceedings states in detail the question presented and the reasons for the making of the said order, and since the same is forwarded to the Court herewith, it is not deemed necessary to make any further comments or observations in this Certificate pertaining to the contents of the said Order.

Attached to this Certificate are the following documents:

1. Order of Reference.
2. Memorandum of Points and Authorities. (Petitioner's).
3. Brief of the Defendant Thomas Mitchell.
4. Petitioner's Concluding Brief.
5. Order Dismissing Proceedings.
6. Petition for Order Extending Time for Review.
7. Order Extending Time for Review.
8. Petition for Review.

Dated: May 25, 1942.

Respectfully submitted,

HUBERT F. LAUGHARN,

Referee in Bankruptcy.

[Endorsed]: Filed May 25, 1942. [29]

In the District Court of the United States, Southern
District of California, Central Division

No. 39,517-BH

In the Matter of

ELSA METZ MASON and
THOMAS MITCHELL, Copartners,
Alleged Bankrupt,

MEMORANDUM OPINION

It is my conclusion that the provisions of Sub. b of Sec. 5 of the Bankruptcy Act, Title 11, Sec. 23 (b) USCA as added by the Chandler Act reading as follows:

“Provided, however, that where a petition is filed in behalf of a partnership by less than all of the general partners, the petition shall allege that the partnership is insolvent.”

does not change the established law “that a partnership is not bankrupt so long as any members who compose it is individually solvent.” (In re Samuels, 215 Fed. 845). Under the allegation required by said Sub. b of Section 5, before an adjudication would be authorized it would be incumbent upon the petitioners to prove that all the members of said partnership are insolvent.

To me the word “partnership” as used in said section includes its membership.

The Referee has ably covered the subject matter of this review and as I am in complete accord with

his conclusions, the order of the Referee is hereby affirmed.

Dated: Los Angeles, California, June 29, 1942.

BEN HARRISON,
Judge.

[Endorsed]: Filed Jun. 29, 1942. [30]

At a stated term, to wit: The February Term, A. D. 1942 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 29th day of June in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable Ben Harrison, District Judge.

No. 39517-BH-Bkey.

[Title of Cause.]

This matter having been heretofore heard by the Court pursuant to stipulation for time of hearing filed June 4, 1942, upon petition for review of referee's order dated May 8, 1942, dismissing this proceeding, and submitted, and the Court having duly considered the record and the briefs of counsel and the law applicable, and being fully advised in the premises, now hands down and orders filed its Memorandum Opinion, and in accordance therewith orders the said Order of the Referee on review is affirmed. [30A]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Thomas Mitchell and to Rupert B. Turnbull,
Esq., and Kenneth White, Esq., his attorneys:

You and each of you will please take notice that the Elsa Metz Mason, one of the alleged bankrupt copartners in the above matter, is appealing from an order of the above-entitled Court made and entered in the minutes of said Court on June 29, 1942, whereby the order of the Referee in Bankruptcy dismissing the above-entitled proceeding was affirmed, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: August 4, 1942.

EARL E. MOSS,

Attorney for Elsa Metz Mason

[Endorsed]: Filed & mld. copy to R. B. Turnbull
& Kenneth White, Aug. 5, 1942. [31]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Comes now Elsa Metz Mason, one of the alleged bankrupts in the above-entitled proceeding and appellant therein, and hereby submits a concise statement of points on which she intends to rely on the appeal of the above-entitled proceeding as follows:

1. That the above-entitled District Court erred in affirming an order of the Referee in Bankruptcy dated May 8, 1942, dismissing all proceedings in said cause.

2. A partnership petition in bankruptcy which alleges insolvency of the partnership is sufficient without a further allegation that each of the partners is also insolvent.

3. A partnership is insolvent and may file its petition in bankruptcy whenever the aggregate of its property, exclusive of any property which it may have conveyed, transferred, concealed, removed or permitted to be concealed or removed, with intent to defraud, binder, or delay its creditors, shall not at a fair valuation be sufficient in amount to pay its debts; there is no requirement that all of the individual partners must also be insolvent.

4. Even though a partner who refuses to join in a partnership petition in bankruptcy alleges in his answer and proves that he has sufficient individual property and money to pay all of the debts of the partnership, such allegation and proof does not

justify a dismissal of the petition, if the partnership is [32] otherwise insolvent.

Dated: August 5, 1942.

EARL E. MOSS,

Attorney for Appellant.

[Endorsed]: Filed Aug. 8, 1942. [33]

[Title of District Court and Cause.]

STIPULATION REGARDING RECORD ON
APPEAL

It Is Hereby Stipulated and Agreed by and between Elsa Metz Mason and Thomas Mitchell, alleged copartners and alleged bankrupts in the above-entitled matter, through their respective attorneys, that on or about April 2, 1942, at 10:00 A. M. in the trial of said cause in the above-entitled Court before Hubert F. Laugharn, Referee in Bankruptcy, it was stipulated by and between said parties, through their respective attorneys as follows:

That said Thomas Mitchell, at the time when the petition in bankruptcy herein was filed and at all times mentioned therein, had sufficient assets other than those exempt from execution, to pay all of his personal debts, all of the debts of said Elsa Metz Mason and all of the debts of said alleged copartnership.

It Is Further Stipulated and Agreed that said facts and this stipulation shall be included as part

of the contents of the record on the appeal commenced on or about August 4, 1942, in the above-entitled cause.

Dated: August 26, 1942.

EARL E. MOSS,

Attorney for said Elsa Metz
Mason.

RUPERT B. TURNBULL,

Attorney for said Thomas
Mitchell.

It is so ordered.

C. E. BEAUMONT,
Judge.

[Endorsed]: Filed Aug. 28, 1942. [34]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Elsa Metz Mason, appellant and alleged bankrupt, hereby designates the portions of the record, proceedings and pleadings in the above-entitled cause to be contained in the record on appeal as follows:

1. Partnership petition in bankruptcy filed October 21, 1941.
2. Answer of Thomas Mitchell filed October 31, 1941.
3. Order of Referee in Bankruptcy dated May 8, 1942, dismissing all proceedings in said cause.

4. Petition for review dated May 18, 1942.
5. Referee's certificate on review dated May 24, 1942.
6. Order of above-entitled District Court affirming opinion of Referee dated June 29, 1942.
7. Notice of appeal and record of service thereof.
8. Statement of points on which appellant intends to rely.
9. Designation of contents of record on appeal.
10. Clerk's certification of said record.

Dated: August 5, 1942.

EARL E. MOSS,

Attorney for Appellant. [35]

Copies mailed to Rupert Turnbull and Kenneth White, attys. for respondent, Aug. 7, 1942.

[Endorsed]: Filed Aug. 8, 1942. [36]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 36 inclusive contain full, true and correct copies of Partnership Petition; Answer of Thomas Mitchell; Minute Order entered February 9, 1942; Order Dismissing Proceedings; Petition for Review; Referee's Certificate on Re-

view; Memorandum Opinion and Order of Court thereon entered June 29, 1942; Notice of Appeal; Statement of Points on which Appellant Intends to Rely; Stipulation Regarding Record on Appeal and Designation of Contents of Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to \$7.20, which amount has been paid to me by the Appellant.

Witness my hand and the seal of the said District Court this 11th day of September, 1942.

EDMUND L. SMITH,
Clerk.

[Seal] By THEODORE HOCKE,
Deputy Clerk.

[Endorsed]: No. 10249. United States Circuit Court of Appeals for the Ninth Circuit. Elsa Metz Mason, Appellant, vs. Thomas Mitchell, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed September 12, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 10249

In the Matter of

ELSA METZ MASON and
THOMAS MITCHELL, Copartners,
Alleged Bankrupt.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY AND DES-
IGNATION OF PARTS OF RECORD SUB-
MITTED FOR CONSIDERATION ON
APPEAL

Elsa Metz Mason, as appellant and one of the alleged bankrupts in the above-entitled matter, hereby incorporates by reference herein her Statement of Points on which Appellant Intends to Rely which was filed in the District Court of the United States, Southern District of California, Central Division, and which is part of the record on appeal of said trial court in said proceeding.

Further, said Elsa Metz Mason hereby designates the parts of the record on appeal in said proceeding which she thinks are necessary for the consideration thereof as follows:

1. Partnership petition in bankruptcy filed October 21, 1941.
2. Answer of Thomas Mitchell filed October 31, 1941.

3. Order of Referee in Bankruptcy dated May 8, 1942, dismissing all proceedings in said cause.

4. Petition for review dated May 18, 1942.

5. Referee's certificate on review dated May 24, 1942.

6. Order of above-entitled District Court affirming opinion of Referee dated June 29, 1942.

7. Notice of appeal and record of service thereof.

8. Statement of points on which appellant intends to rely.

9. Designation of contents of record on appeal.

10. This statement of points on which appellant intends to rely and designation of parts of record submitted for consideration on appeal.

11. Stipulation regarding Record on Appeal dated August 26, 1942.

12. Clerk's certification of said record.

Dated: September 4, 1942.

EARL E. MOSS,

Attorney for said Elsa Metz
Mason, appellant and al-
leged bankrupt.

Copy mailed Rupert B. Turnbull, Attorney for
Respondent, Thomas Mitchell, September 3, 1942.

[Endorsed]: Filed Sept. 12, 1942.

